Before K.C. Puri, J.

HAPPY—*Appellant*

versus

STATE OF PUNJAB—*Respondent*

CRA.-S- 3007-SB of 2010

April 23, 2013

A. Indian Penal Code, 1860 - Ss. 452/34 & 376(2)(g) - Code of Criminal Procedure, 1973 - Appeal against conviction - Ss. 452/34 & 376(2)(g) IPC - Prosecution not examining witness who was not present at the time of occurrence - Examination not material and not fatal for prosecution case - Non-production of case property also not fatal for prosecution as case does not depend upon recovery of case property - Statement of prosecutrix cannot suffer on account of lapse on part of Investigating Officer - Appeal dismissed

Held, that Amandeep Kaur was not present at the time of occurrence and as such her examination is not material. So, non-production of that witness is not fatal for the prosecution. Prosecutrix has categorically stated that accused Harpal Singh and Happy have actively participated in the occurrence of gang rape. Prosecutrix has categorically stated that accused present in the Court came inside the room after scaling the wall of the house. The appellants have not disputed about the identity of any of them and as such above said argument is without any force.

(Para 11)

Further held, that the delay in lodging the FIR is not fatal in case it is properly explained. In the Indian Society the honour of a lady is put at stake while lodging the FIR under Section 376(2)(g) of the IPC. So in these circumstances, the family members think number of times before lodging of the FIR.

(Para 17)

Further held, that non-production of clothes is not fatal for the prosecution. It is not a case depending upon recovery of case property. The statement of the prosecutrix is better than an injured witness. Facts of authority Sunder Pal's case(Supra) are distinguishable as in that case child was abducted for ransom and ransom, money was not produced before the Court. There were other suspicious circumstances in the said case and as such the appellants cannot have benefit of said authority.

(Para 20)

B. Compromise between Accused-Appellants and Prosecutrix-not accepted by High Court for quashing FIR-whether can be used to seek acquittal or get sentence reduced to that already undergone-held, no.

Held, that the offence under Section 376(2)(g) of the Act is not compoundable. The factum of rape tarnished the prosecutrix and it creates bad impression on her mind which lasts till her life. Keeping in view the trend of increasing rape, the Parliament in its wisdom has passed ordinance for taking severe punishment for sexual offences against the woman. The minimum sentence of ten years has been prescribed under Section 376(2)(g) of the IPC and there is no special reason to reduce the sentence qua Binder Singh accused-appellant. Therefore, the prayer of the appellant- Binder Singh cannot be accepted.

(Para 29)

Further held, that the physical scar may heal up but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. The offender robs the victim of her most valuable and priceless possession that is dignity. Undue sympathy to impose inadequate sentence would be more harm to

the justice system to undermine the public confidence in the efficacy of law. So, Binder Singh - accused-appellant, who has committed rape upon the prosecutrix, cannot derive any benefit from the aforesaid authority.

(Para 32)

C. Indian Penal Code 1860-Section 376(2)(g)-gang rape-whether actual sexual intercourse by each of accused necessary-held, no-person facilitating rape equally culpable-however, sentence reduced and appeal of co-accused partly accepted.

Held, that the actual sexual inter course by each of the accused is not necessary. According to the prosecution Harpal Singh@ Palli and Happy accused facilitated the rape upon the prosecutrix at the hands of Binder Singh accused. So, in these circumstances, ingredient of offence under Section 376(2)(g) of the IPC are also made out against accused Harpal Singh @ Palli and Happy accused-appellants alongwith Binder Singh appellant, the accused who had actually committed rape upon the prosecutrix.

(Para 36)

Ashok Giri, Advocate, *for the appellant.*

S.S.Chandumajra, Senior DAG, Punjab.

K. C. PURI, J.

(1) By this common judgment I intend to dispose of **Criminal Appeal No. S.3007 SB of 2010 titled as Happy versus State of Punjab; Criminal Appeal No. S.3064 SB of 2010 titled as Harpal Singh @ Palli versus State of Punjab and Criminal Appeal No. S.3118 SB of 2010 titled as Binder Singh versus State of Punjab as all these appeals have arisen out of the same judgment and incident. For convenience facts are being taken from Criminal Appeal No. S.3007 SB of 2010 titled as Happy versus State of Punjab.**

(2) Aforesaid appeals have been directed by appellants against the judgment and order dated 27.10.2010 passed by Shri B.K. Mehta, learned Additional Sessions Judge, Sangrur vide which accused/appellants were convicted under Sections 452 and 376(2)(g) of the Indian Penal Code

(in short the IPC) and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.10,000/- each and in default of payment of fine to further undergo rigorous imprisonment for a period of one year each under Section 376(2)(g) of the IPC and to further undergo rigorous imprisonment for a period of three years each and to pay a fine of Rs.5,000/- each and in default of payment of fine to further undergo rigorous imprisonment for a period of one year under Section 452 of the IPC. However, both the sentences were ordered to run concurrently.

(3) The story of the prosecution in brief is that the prosecutrix hails from Bihar and was residing with her husband in the house of Malwinder Singh in village Fatehgarh Chhanna where she was working as a maidhelper was lying on a cot in her house after getting free from household chores. Accused Binder Singh, Harpal Singh and Happy Singh came inside her house after scaling over the boundary wall of her house. Harpal Singh caught hold of the prosecutrix from both of her arms whereas Happy Singh forcibly removed her salwar and Binder Singh raped her. During the course of being raped prosecutrix kept on crying loudly which attracted her husband Naresh Sadda to the scene on whose arrival all the three accused tried to flee. Naresh Sadda caught hold of one of the fleeing accused namely Binder Singh but he still managed to give him a slip but in the process a part of the shirt of Binder Singh gave away and remained behind in the hands of Naresh Sadda. Amandeep Kaur, daughter of Malwinder Singh removed the prosecutrix to Civil Hospital, Sangrur where she was medicolegally examined and treated upon. Upon receipt of this information, FIR was lodged and investigations were commenced. Medico-legal examination of the prosecutrix was got conducted. The accused were arrested. After completion of the investigations, challan against the accused was presented in the court for trial of the case.

(4) On appearance of the accused copies of documents relied upon by the prosecution were supplied to them free of costs. The offence punishable under Section 376 of the IPC is exclusively triable by the Court of Session and the learned Illaqua Magistrate committed the case to the Court of Session vide order dated 19.9.2009.

(5) The trial Court framed charges under Sections 452/34 and 376 (2)(g) of the IPC against the accused persons. They pleaded not guilty thereto and claimed trial.

(6) In order to establish its case, prosecution examined Dr. Sanjiv Aggarwal as PW-1, Dr. Sumandeep Kaur Grewal as PW-2, Dr. Balwant Singh, PW-3, HC Gurtej Singh PW-4, HC Taranjit Singh as PW-5, HC Paramjit Singh (PW-6), ASI Gurjit Singh PW-7, prosecutrix herself appeared as PW8, Naresh Sada as PW-9 and closed the prosecution evidence.

(7) In their statements recorded under Section 313 Cr. P. C., the accused denied all the incriminating evidence appearing against them and pleaded their false implication. It is alleged by the accused that Naresh Sadda had borrowed some money from the accused and when they started insisting for repayment, instant false case has been planted. They did not lead any evidence in defence.

(8) The trial Court, after hearing the learned counsel for the parties convicted and sentence the accused vide judgment and order dated 27.10.2010, as aforesaid.

(9) Feeling dissatisfied with the aforesaid judgment and order dated 27.10.2010, the accused/appellants have directed the present appeal.

(10) I have heard learned counsel for the parties and have gone through the records of the case.

(11) Learned counsel for the appellants have submitted that name of the accused Harpal Singh and Happy were not known to the prosecutrix. According to the prosecutrix name of Harpal Singh and Happy accusedappellants have been told to her by Amandeep Kaur but the prosecution has not examined Amandeep Kaur to prove its case and as such prosecution story is doubtful, more-so qua Harpal Singh and Happy accused-appellants.

(12) I have considered the said submission but do not find any force in that submission.

(13) Amandeep Kaur was not present at the time of occurrence and as such her examination is not material. So, non- production of that witness is not fatal for the prosecution. Prosecutrix has categorically stated that accused Harpal Singh and Happy have actively participated in the occurrence of gang rape. Prosecutrix has categorically stated that accused present in the Court came inside the room after scaling the wall of the house. The appellants have not disputed about the identity of any of them and as such above said argument is without any force.

(14) Learned counsel for the appellants have further submitted that according to the prosecution occurrence has taken place on 23.7.2009 at 11.00a.m., prosecutrix was examined as on 23.7.2009 by Dr. Sanjiv Aggarwal (PW-1) Medical Officer at Civil Hospital, Sangrur and found two minor injuries on the lower arm and pain in forehead, neck and shoulder. Prosecutrix was not examined regarding the allegation of rape on 23.7.2009. She was again examined by Dr. Sumandeep Kaur Grewal on 25.7.2009. This witness has stated that neither any scar mark nor any injury was found on the person of prosecutrix. She has given the opinion regarding sexual intercourse on the basis of Chemical report Ex.PW2/E in which spermatozoa was detected in contents of Cervical swab and salwar of the prosecutrix. She has given the opinion regarding rape for the first time in the Court on 26.10.2009. The prosecutrix was a married woman and as such presence of spermatozoa on swab and salwar could be the result of her sexual intercourse with her husband. Prosecution has not proved the fact that spermatozoa belonged to any of the accused including Binder Singh. There must be sign of struggle on the body of prosecutrix in case she had been subjected to rape at the hands of three persons. Absence of any injury on her person altogether rules out the factum of rape.

(15) I have considered the said submission but do not find any force in that submission.

(16) Mere fact that on 23.7.2009 prosecutrix was not examined regarding the factum of rape does not create any doubt in the prosecution version. The prosecution cannot be penalized for the lapse on the part of the investigating officer. Previously the police personnel's were hesitant to lodge the FIR under Section 376 of the IPC. Mere fact that doctor has given opinion regarding rape for the first time in the court does not create suspicious in the prosecution version. The contents of cervical swab and salwar of the prosecutrix contains spermatozoa. No doubt the prosecutrix was a married lady at the time of occurrence but that ground itself is not sufficient to conclude that her testimony is false. There were two injuries on the person of the prosecutrix which corroborates the factum of rape. There was reddish abrasion 1 cm x 0.5cm on the right lower arm in the middle of the prosecutrix. There was pain and tenderness over head, neck and shoulder of the prosecutrix. So, it cannot be said that there was no forcible rape on the prosecutrix.

(17) Learned counsel for the appellants have further submitted that there is a delay in lodging the FIR, which creates doubt in the prosecution version.

(18) I have considered the said submission but do not find any force in that submission.

(19) The delay in lodging the FIR is not fatal in case it is properly explained. In the Indian Society the honour of a lady is put at stake while lodging the FIR under Section 376(2)(g) of the IPC. So, in these circumstances, the family members think number of times before lodging of the FIR.

(20) Learned counsel for the appellants have further submitted that case property has not been produced and on that account the prosecution story is doubtful. Learned counsel for the appellants have relied upon authority ***Sunder Pal*** versus ***State of Haryana (1),*** in support of their argument.

(21) I have considered the said submission but do not find any force in that submission.

(22) Non-production of clothes is not fatal for the prosecution. It is not a case depending upon recovery of case property. The statement of the prosecutrix is better than an injured witness. Facts of authority **Sunder Pal's case (supra)** are distinguishable as in that case child was abducted for ransom and ransom, money was not produced before the Court. There were other suspicious circumstances in the said case and as such the appellants cannot have benefit of said authority.

(23) It is further submitted that Naresh Sada (PW-9) husband of the prosecutrix has not supported the case of the prosecution. It is further submitted that he was declared hostile and he even then not supported the case of the prosecution. He has not stated that prosecutrix disclosed him that she was subjected to gang rape at the hands of the accused. So, the prosecution story is doubtful.

(24) I have considered the said submission but do not find any force in that submission.

(25) Mere fact that Naresh Sada (PW-9) husband of the prosecutrix has resiled from the previous statement is not a ground to discard the sworn testimony. The prosecution has to face great humps for the success of the

(1) 2006 (2) R.C.R. (Crl.) 307

case. The witnesses are won over by the accused on different considerations including threat, money power etc. So, mere fact that husband of the prosecutrix has resiled does not create doubt in the prosecution story.

(26) Learned counsel for the appellants have further submitted that in fact husband of the prosecutrix owed money to the accused and on that account false case has been registered against the appellants to put pressure upon them not to demand the amount.

(27) I have considered the said submission but do not find any force in that submission.

(28) Not even a single document that husband of the prosecutrix owed money to any of the accused has been produced on the file. The stand of the appellants/accused that husband of the prosecutrix registered a false case on account of money transaction has rightly been declined by the trial Court.

(29) Learned counsel for the appellants have further contended that accused/appellants moved an Criminal Misc. application No.M.5183 of 2010 for quashing FIR in question on the basis of compromise with the prosecutrix. The said petition was dismissed as withdrawn as offence under Section 376(2)(g) of the IPC cannot be allowed to be compounded. However, learned counsel for the appellant has further submitted that in case this Court is not inclined to accept the prayer of the appellants for acquittal of the accused, in that case, the sentence be reduced to the period already undergone as appellants are in custody for the last more than 3½ years and have also earned remissions.

(30) I have considered the said submission but do not find any force in that submission.

(31) The offence under Section 376(2)(g) of the Act is not compoundable. The factum of rape tarnished the prosecutrix and it creates bad impression on her mind which lasts till her life. Keeping in view the trend of increasing rape, the Parliament in its wisdom has passed ordinance for taking severe punishment for sexual offences against the woman. The minimum sentence of ten years has been prescribed under Section 376(2)(g) of the IPC and there is no special reason to reduce the sentence qua Binder Singh accused-appellant. Therefore, the prayer of the appellant-Binder Singh cannot be accepted.

(32) Learned counsel for State has relied upon authority ***Priya Patel vs. State of M.P. & Anr. (2),*** wherein it has been held by Hon'ble Apex Court that woman cannot be guilty of offence under Section 376(2)(g) of the IPC. In para No.8 of the said judgment it has been further laid down that where there is a common intention of group of persons to commit rape but only one of them committing the rape in furtherance of common intention, each person of the group shall be deemed to have committed gang rape though he did not actually commit rape, in view of explanation (1) of Section 376(2)(g) of the IPC.

(33) Learned counsel for appellants have further relied upon authority of this Court ***State of Haryana*** versus ***Balwan son of Daya Nand (3).*** The facts of that case are distinguishable as in that case prosecutrix was literate lady but introduced a different story during the course of trial. She made material improvements in her Court statement. So, that authority does not help the appellants in any manner.

(34) Learned counsel for appellants have further relied upon authority ***State of M.P.*** versus ***Basodi (4),*** wherein Hon'ble Apex Court has held that Court has the discretion to impose less prescribed minimum sentence after giving adequate special reasons. There is no dispute to that proposition of law. In that case it has been further observed by the Hon'ble Apex Court that offence under Section 376 of the IPC is an offence affecting the human body. The physical scar may heal up but the mental scar will always remain. When a woman is ravished, what is inflicted is not merely physical injury but the deep sense of some deathless shame. The offender robs the victim of her most valuable and priceless possession that is dignity. Undue sympathy to impose inadequate sentence would be more harm to the justice system to undermine the public confidence in the efficacy of law. So, Binder Singhaccused- appellant, who has committed rape upon the prosecutrix, cannot derive any benefit from the aforesaid authority.

(35) So, the appeal preferred by Binder Singh-accused-appellant has no merit and the same stands dismissed.

(36) However, learned counsel for the appellants Harpal Singh and Happy have submitted that allegations of actual rape have been levelled against Binder Singh accused-appellant only. Neither prosecutrix nor any

(2) 2006(3) RCR (Crl.) 545
(3) 2009 (5) RCR (Crl.) 436
(4) 2009 (2) RCR (Crl.) 842

other witness of the prosecution have stated about the factum of rape by Harpal Singh and Happy accused-appellants. The story of caught hold by these accused to the prosecutrix, does not appeal to the reason.

(37) Learned counsel for the appellants have submitted that allegation of actual rape are not against Harpal Singh @ Palli and Happy accused and on that account they cannot be convicted for offence under Section 376 (2(g) of the IPC.

(38) The actual sexual inter course by each of the accused is not necessary. According to the prosecution Harpal Singh @ Palli and Happy accused facilitated the rape upon the prosecutrix at the hands of Binder Singh accused. So, in these circumstances, ingredient of offence under Sections 376(2)(g) of the IPC are also made out against accused Harpal Singh @ Palli and Happy accused-appellants along with Binder Singh appellant, the accused who had actually committed rape upon the prosecutrix. Learned counsel for the appellants Harpal Singh @ Palli and Happy relied upon authority ***Shakil Karim Tamboli*** versus ***State of Maharashtra (5),*** as in that authority two of the accused committed rape inside the house and the third accused stood guard out side. All the three accused were convicted under Sections 376(2)(g) of the IPC. However, sentence of the accused who stood outside to guard was reduced to seven years.

(39) So, keeping in view the ratio of authority **Shakil Karim Tamboli 's case (supra),** the appeals preferred by accused- appellants Harpal Singh @ Palli and Happy stand partly accepted. The sentence imposed by the trial Court on both accused accused-appellants Harpal Singh @ Palli and Happy stood reduced to rigorous imprisonment of seven years instead of rigorous imprisonment of ten years.

(40) With the reduction in sentence, both the appeals preferred by accused-appellants Harpal Singh @ Palli and Happy stand disposed of accordingly.

(41) A copy of this judgment be sent to the trial Court for strict compliance.

S. Gupta

(5) 2009 (3) RCR (Crl.) 173